APPEAL NO. 120132
FILED MARCH 26, 2012

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on December 15, 2011, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer determined that the compensable injury of [date of injury], "includes the lumbar sprain/strain, cervical sprain, cervical disc bulge at C4-5, myofascial pain of the lumbar region, right shoulder strain, depression, anxiety and post-traumatic cephalgia." The hearing officer also determined that the respondent (claimant) has not reached maximum medical improvement (MMI) and because the claimant has not reached MMI, there was no impairment rating (IR) that could be adopted.

The appellant (carrier) appealed, contending that the hearing officer had: (1) failed to accept stipulations; (2) had not properly assigned weight to the designated doctor's report; (3) had improperly identified a required medical examination (RME) doctor as the designated doctor; (4) had failed to omit a certain condition from the extent-of-injury issue; and (5) had excluded conditions the parties had agreed on. The carrier also appealed the hearing officer's determination on the extent-of-injury issue. The claimant responded that "although the [hearing officer] misstates the designated doctor's name," the hearing officer's decision should be affirmed.

DECISION

Reversed and remanded.

THE STIPULATIONS AND EXTENT OF INJURY

The extent-of-injury issue reported out of the benefit review conference (BRC) and amended at the CCH was whether the compensable injury of [date of injury], includes: "the lumbar sprain/strain, cervical sprain, cervical disc bulge at C4-5 with annular tear, myofascial pain of the lumbar region, right shoulder strain, depression, anxiety and post-traumatic cephalgia?" At the CCH the parties agreed to revise the issue to read; "[d]oes the compensable injury . . . include the lumbar sprain/strain, cervical sprain, cervical disc bulge at C4-5 with annular tear, right shoulder strain, depression, anxiety, post-traumatic cephalgia and head contusion." The condition of "myofascial pain of the lumbar region" in the issue reported out of the BRC was omitted and a condition of "head contusion" was added. The hearing officer announced "with agreement of the parties we'll amend issue one." Nonetheless, the hearing officer in his determination incorrectly found the compensable injury included a condition not at issue

(myofascial pain of the lumbar region) and failed to include and make a determination on a condition which had been added (the head contusion). Furthermore, Conclusion of Law No. 3 omitted the phrase "with annular tear" after the condition "cervical disc bulge at C4-5."

The parties, at the CCH, also stipulated that the designated doctor for extent of injury was [Dr. K] and the "other designated doctor" for MMI, IR and return to work was [Dr. R]. The hearing officer announced "we'll adopt those" stipulations. The hearing officer failed to list those stipulations in his decision. In Findings of Fact Nos. 5 and 6, the hearing officer found "the designated doctor, [Dr. B] certified the [c]laimant reached MMI on September 6, 2011, with no permanent impairment" and the "opinions of [Dr. B] are overcome by a preponderance of the expert medical evidence." Dr. B is actually a post-designated RME doctor and as noted in the stipulation, Dr. R is the designated doctor appointed to give an opinion on MMI, IR and return to work.

The evidence establishes that the carrier has accepted that the compensable injury "is limited to right side of thoracic region of the spine-soft tissue myofascial strain and contusion of the right anterior–inferior thigh only." (Notice of Disputed Issue(s) and Refusal to Pay Benefits) (PLN-11) dated June 23, 2010.)

Section 408.0041(a)(3) provides that at the request of the insurance carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination to resolve any question about the extent of the employee's compensable injury. Section 408.0041(e) provides in part that the report of the designated doctor has presumptive weight unless the preponderance of the evidence is to the contrary. *See also* 28 TEX. ADMIN. CODE § 127.1(a)(3) (Rule 127.1(a)(3)) and Rule 127.10(g).

Dr. K was the designated doctor for extent of injury. In a report dated June 6, 2011, Dr. K gave an impression of: 1) post-traumatic cephalgia; 2) cervical disc syndrome without radiculopathy; 3) right dorsal myofascial pain; 4) right lower rib contusion; and 5) myofascial lumbar pain. Dr. K in his June 6, 2011, report then details the injuries which arose out of the compensable injury as: post-traumatic cephalgia and a right/paracentral annular tear at C4-5 with a 2-3 mm disc protrusion; cervical disc syndrome without radiculopathy; dorsolumbar region pain; and right chest pain.

We reverse the hearing officer's determination that the compensable injury of [date of injury], extends to lumbar sprain/strain, cervical sprain, cervical disc bulge at C4-5, myofascial pain of the lumbar region, right shoulder strain, depression, anxiety and post-traumatic cephalgia and remand the issue to the hearing officer to correct the extent-of-injury issue.

We remand the case for the hearing officer to correctly identify the designated doctor, accord his report presumptive weight unless overcome by a preponderance of the evidence and list and make findings on the correct conditions regarding the extent-of-injury issue as litigated by the parties.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. Rule 130.1(c)(3) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

Rule 130.1(c)(3) provides in pertinent part that the assignment of an IR shall be based on the injured worker's condition as of the MMI date considering the medical records and the certifying examination and the doctor assigning the IR shall:

(A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury;

(B) document specific laboratory or clinical findings of an impairment;

(C) analyze specific clinical and laboratory findings of an impairment;

(D) compare the results of the analysis with the impairment criteria and provide the following:

(i) [a] description and explanation of specific clinical findings related to each impairment, including [zero percent] [IRs]; and

(ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter of the [Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by

> the American Medical Association prior to May 16, 2000) (AMA Guides)]. The doctor's inability to obtain required measurements must be explained.

Dr. R is the designated doctor for MMI, IR and return to work. In evidence is a Report of Medical Evaluation (DWC-69) and narrative, both dated December 7, 2010. (We note the DWC-69 does not have an examination date or date of certification.) Dr. R certified clinical MMI on December 7, 2010, with a three percent IR. It was Dr. R's opinion that it was unlikely that the claimant would experience significant improvement so he selected December 7, 2010, as the MMI date. Dr. R states that he used the AMA Guides. Dr. R indicated he is rating the thoracic spine, that the claimant continues to have pain in the area and stated: "[g]iven those findings, it appears that [the claimant] is somewhere in between Category I [Diagnosis-Related Estimate (DRE) Cervicothoracic Category I: Complaints or Symptoms] and Category II [DRE Cervicothoracic Category II: Minor Impairment.] To this I would assign a whole person impairment percentage of three percent." The AMA Guides have no provision for interpolating between DRE categories. The AMA Guides Section 3.3f Specific Procedures and Directions page 3/101 states:

> If the physician cannot place the patient into an impairment category, or if disagreement exists about which of two or three categories to use for the patient, the physician should use the Range of Motion Model as a differentiator as explained in Section 3.3b (p. 99, "Differentiators.")

Because the extent-of-injury issue has not been resolved, Dr. R's MMI and IR cannot be adopted.

Dr. B, the RME doctor, in a DWC-69 and narrative, both dated September 6, 2011, certified that date as the date of MMI with a zero percent IR. In his narrative Dr. B stated that the claimant reached MMI "a number of months ago." Dr. B only rates a contusion of the right rib cage and thoracic spine and a contusion of both knees and right thigh. In a subsequent DWC-69, dated November 21, 2011, referencing the September 6, 2011, examination, Dr. B certified the claimant at clinical MMI on August 1, 2011, with a zero percent IR. In an attached letter, Dr. B stated he was asked to reassess his findings in accordance with the 4th Edition of the AMA Guides as he had previously used the 6th Edition. Because the extent of injury has not been resolved, Dr. B's rating cannot be adopted.

In evidence is a DWC-69 and narrative both referencing a June 16, 2011, examination by [Dr. DK], the treating doctor. Dr. DK certified that the claimant was not at MMI until the claimant's "psychological depression and other issues were better

treated." Dr. DK also thought the claimant's thoracic spine pain needed further evaluation.

Because the extent of injury has not been resolved, we reverse the hearing officer's determinations that the claimant has not reached MMI and no IR can be assessed. We remand the issues of MMI and IR for further consideration consistent with this decision.

REMAND INSTRUCTIONS

The hearing officer is first to correct the extent-of-injury issue as amended by the parties. The hearing officer is also to add the stipulations that the designated doctor for extent of injury was Dr. K and the designated doctor for MMI, IR and return to work was Dr. R.

The designated doctor for MMI and IR is Dr. R. On remand, the hearing officer is to determine if Dr. R is still qualified and available to serve as the designated doctor, and if so, advise the designated doctor what conditions are accepted as part of the compensable injury and which body parts/conditions are in dispute and request the designated doctor to render an opinion on MMI and IR. The designated doctor is to provide alternate ratings as necessary. All the medical records are to be sent to the designated doctor. The designated doctor is to rate the entire compensable injury in accordance with the 4th Edition of the AMA Guides based on the claimant's condition as of the date of MMI and in accordance with Rule 130.1(c). The hearing officer is to provide the letter being sent to the designated doctor and the designated doctor's response to the parties and allow the parties to respond. If Dr. R is no longer qualified or available to serve as the designated doctor, another designated doctor is to be appointed pursuant to Rule 127.5(c) to give an opinion on MMI and IR for the compensable injury as of the date of MMI. The hearing officer is then to make a determination of the claimant's extent of injury, MMI and IR that is supported by the evidence and consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge